COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-182

JEANETTE MCCUSKER, personal representative,[1]

vs.

DONALD P. KENNEFICK & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Jeanette McCusker, brought a wrongful death action against the defendants, Donald P. Kennefick, Mary Kennefick, and Jacob Kennefick, after McCusker's daughter, Elizabeth Dayter, tragically drowned in a pond about half a mile from the Kenneficks' home. While we recognize that Elizabeth's death was devastating for all parties, we conclude, as did the motion judge, that the complaint failed to allege any facts which established a duty of care. We therefore affirm the judgment dismissing the complaint.

Background. The complaint alleged that Elizabeth, who was three years old, "was a guest of" and was "in the custody of" the defendants at their home. The complaint further alleged

[1] Of the estate of Elizabeth Marie Dayter.

[2] Mary Kennefick and Jacob Kennefick.

that Elizabeth "was negligently allowed" to roam outside the defendants' home with Jacob, Donald and Mary's intellectually challenged son. It was alleged that Jacob and Elizabeth were "allowed" to walk off the defendants' property and wander through the woods to a pond, where Elizabeth attempted to swim, and that Jacob did nothing to stop or prevent Elizabeth from going into the water. Tragically, Elizabeth drowned.

Discussion. Whether a duty of care exists is a question of law which is appropriately considered on a motion to dismiss. Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 40 (2009). To survive a motion to dismiss, the factual allegations must plausibly suggest, not be merely consistent with, an entitlement to relief. Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 164 (2014). These factual allegations must be more than mere "labels and conclusions" and must "raise a right to relief above the speculative level." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

Generally, "a person has no legal duty 'to prevent the harmful consequences of a condition or situation he or she did not create.'" O'Meara v. New England Life Flight, Inc., 65 Mass. App. Ct. 543, 544 (2006), quoting Luoni v. Berube, 431 Mass. 729, 733-734 (2000). As such, Massachusetts courts "reject claims of liability against social hosts in negligence,

in the absence of a recognized legal basis requiring them to protect guests." Id. at 735. Liability may exist, however, where there is a special relationship between a homeowner and the decedent. Id. at 731.

The plaintiff argues that a special relationship existed between the defendants and the decedent because the decedent was in the defendants' custody. Merely labeling the relationship as a custodial one, however, is insufficient to establish a duty of care. The Restatement (Third) of Torts recognizes a custodian as having a special relationship with those in its custody if "(a) the custodian is required by law to take custody or voluntarily takes custody of the other; and (b) the custodian has a superior ability to protect the other." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40(b) (2012). Custody, therefore, requires more than a mere presence in another person's home. See Luoni, 431 Mass. at 732 ("We have never found such a special relationship between a homeowner and a social guest, which, absent other factors, would obligate the homeowner to protect guests on his premises from hazardous conduct on the part of other guests").

The plaintiff's complaint failed to allege how a custodial relationship arose between the defendants and the decedent. The complaint further failed to allege that the defendants either voluntarily assumed custody of the decedent or were required by

law to do so.[3] Absent such facts, the plaintiff's allegation that the decedent was present in the defendants' home is insufficient to establish an affirmative duty of care to protect the decedent from hazards located off the defendants' property.

The plaintiff argues that this case is analogous to Jupin v. Kask, 447 Mass. 141 (2006), and Judge v. Carrai, 77 Mass. App. Ct. 803 (2010), both of which concluded that a duty of care arose despite the absence of a special relationship. We disagree. In both Jupin and Judge, liability was premised on a third party's use of personal property over which the defendants exercised control. See Jupin, supra at 153 ("The duty contemplated in this case is one of ensuring that, where a property owner has agreed to permit firearms to be stored on her property in a location used by both her and the owner of the firearms, the firearms are secure and not accessible to others who also have been granted unfettered access to the home and might make improper use of them"); Judge, supra at 808 (concluding that social hosts who owned and controlled softball

[3] On appeal, the plaintiff argues that the defendants obtained custody because Mary was a "mother figure" and because the decedent was accustomed to being with the defendants. Even if such facts had been alleged in the complaint, they are insufficient to establish that Mary voluntarily assumed custody of the decedent on this occasion. The plaintiff's boyfriend, Nicholas, brought the decedent to the defendants' home, and there is no allegation that Nicholas left the decedent with the defendants or was otherwise unavailable to care for and supervise the decedent.

equipment and allowed other guests to use equipment owed duty of care to individuals who could be injured by equipment). The defendants here exercised no control over the danger that ultimately resulted in the decedent's death. They did not own the pond nor was it located on their property. Thus, neither Jupin nor Judge supports imposing a duty of care in this case.[4]

The plaintiff's claim also bears no resemblance to the facts in either Brown v. Knight, 362 Mass. 350 (1972), or Scott v. Thompson, 5 Mass. App. Ct. 372 (1977). In each of those cases, the defendant's duty of care arose from an arrangement or regulation that imposed a supervisory obligation on the defendant for the child. See Brown, supra at 352 (summer school owner's duty to protect child from foreseeable harm arose because defendant took pay for and voluntarily assumed custody of child); Scott, supra at 375 (bus driver's duty to supervise children arose from his position as bus driver and safety

[4] The plaintiff argues on appeal that the decedent was out looking for the defendants' dog and that the duty to control the dog, or to keep the dog on a leash, supports imposing a duty of care. This argument is not supported by the complaint, which alleged simply that the decedent and Jacob were out with the dog. Moreover, "[t]here is no duty owed when the risk which results in the plaintiff's injury is not one which could be reasonably anticipated by the defendant." Foley v. Boston Hous. Auth., 407 Mass. 640, 646 (1990), quoting Husband v. Dubose, 26 Mass. App. Ct. 667, 669 (1988). In the absence of any evidence that the dog regularly led the decedent a great distance away from the property, it is not reasonably foreseeable that the decedent would follow the dog to a pond approximately one-half mile from the defendants' property.

regulation which prohibited school bus drivers from leaving children unattended on buses). No similar arrangement or regulation existed here. The plaintiff's claim is also not assisted by citation to the Restatement (Second) of Torts § 318 (1965), as there is no allegation that Jacob, or any other third party, intentionally harmed the decedent or otherwise created the risk of harm.

Finally, we reject the plaintiff's argument that either Mary or Jacob acted unreasonably. There is no factual basis in the complaint in support of the plaintiff's argument that Mary sent the decedent to search for the defendants' dog. There is likewise no legal basis for the plaintiff's assertion that, absent an affirmative duty to act, Jacob acted unreasonably in failing to rescue the decedent or to seek immediate help.

Judgment affirmed.

By the Court (Sullivan, Maldonado & Wendlandt, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 15, 2020.

[5] The panelists are listed in order of seniority.